

Ramanathan v Aharon
2010 NY Slip Op 32517(U)
September 9, 2010
Supreme Court, Queens County
Docket Number: 26744/2009
Judge: Timothy J. Flaherty
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE TIMOTHY J. FLAHERTY IA Part 35
Justice

HENRY RAMANATHAN, et al. x

Index
Number 26744 2009

-against-

Motion
Date June 24 2010

SHMUEL AHARON, et al. x

Motion
Cal. Number 16

Motion Seq. No. 1

SHMUEL AHARON, et al.

-against-

FIDELITY NATIONAL TITLE INSURANCE
COMPANY OF NEW YORK
_____ x

The following papers numbered 1 to 17 read on this motion by Fidelity National Title Insurance Company of New York (Fidelity), to dismiss the third-party complaint pursuant to CPLR 3211(a)(1) and (7), or, alternatively for summary judgment pursuant to CPLR 3211(c).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-7
Answering Affidavits - Exhibits.....	8-12
Reply Affidavits.....	13-14
Other.....	15-17

Upon the foregoing papers it is ordered that the motion is granted.

Shmuel and Terri Aharon (the Aharons) filed the instant third-party complaint alleging that Fidelity must indemnify them, pursuant to a title insurance policy, for any losses that they might incur as a result of the underlying complaint brought by their neighbors, plaintiffs Henry and Devbala Ramanathan (the Ramanathans). The gist of the Ramanathans' complaint is an allegation that the Aharons have erected a fence on their property, and, thus, are liable for trespass. They have demanded relief in the form of ejectment, a permanent injunction and damages. The Aharons have denied the allegation by responding that the fence is actually located within the bounds of their (Aharons') property. Fidelity contends that the dispute over whether a fence is located on one or the other's property does not challenge the Aharons' ownership in any part of the land to which they took title and insured under their policy with Fidelity. Thus, according to Fidelity, the Ramanathans' claims against the Aharons are unrelated to any matter of title and, thus, do not fall within the ambit of the Aharons' title insurance policy issued by Fidelity. Fidelity moves for dismissal of the Aharons' third-party complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action against Fidelity; and pursuant to CPLR 3211(a)(1) because the policy itself evidences that the Aharons' claims are not covered. Alternatively, Fidelity moves for summary judgment pursuant to CPLR 3211(c).

Facts

In or around September 25, 2009, the Ramanathans filed a complaint against the Aharons alleging that the Aharons had erected a 7.8' fence onto the Ramanathans' parcel of land, thereby encroaching and trespassing on their property. According to the facts asserted in the complaint, the Ramanathans own a parcel of land adjacent to the parcel of land owned by the Aharons. The Ramanathans took title to their property in 1986 by a deed in which their property was fully described in a metes-and-bounds legal description. The Aharons took title to their parcel in 1999, also by a deed in which their property was fully described in a metes-and-bounds legal description. In connection with their purchase, the Aharons obtained title insurance policy number 5312-676991 from Fidelity, dated October 14, 1999 (the Policy).

In or around January 4, 2010, the Aharons submitted a verified answer to the complaint. The answer did not deny the enumerated paragraphs describing the properties. However, the Aharons asserted an affirmative defense that the fence existed prior to their acquisition of their land, and that the fence was actually located within the bounds of their property. The Aharons also asserted a counterclaim that if the fence is located on the Ramanathans' property, then the Aharons began a period of adverse possession of the portion of land leading up to the fence, in 1999. Therefore, according to the counterclaim, by the time the Ramanathans filed suit in 2009, the requisite 10-year adverse possession period had run, thereby vesting ownership rights in the Aharons to the 7.8' strip of land.

On October 26, 2009, the Aharons, through counsel, submitted a claim letter to Fidelity requesting that Fidelity defend them in the action against the Ramanathans pursuant to the Policy (the Claim Letter). Fidelity denied coverage by letter dated November 9, 2009. The Aharons then twice requested Fidelity to reconsider its decision and Fidelity denied both requests. In its letters to the Aharons, Fidelity denied coverage on several grounds including (i) if the fence is located outside the boundary of the property, Fidelity did not insure any land outside the property as described in the Policy; (ii) the Policy expressly excepts from coverage any variances in the location of the fence referenced in the survey at issue and (iii) the Policy does not cover any matters created subsequent to the date of the Policy. The Aharons then served the third-party complaint against Fidelity on January 22, 2010, alleging the Policy covers any loss they might sustain as a result of the action against the Ramanathans.

Discussion

The interpretation of the Policy's terms is a question of law for the court (*Chimart Assoc. v Paul*, 66 NY2d 570 [1986]). As with the interpretation of any contract, the unambiguous terms of an insurance policy must be accorded their plain and ordinary meaning (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514 [1996]; *2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299 [2003], *lv denied* 100 NY2d 508 [2003]; *West 56th St. Assoc. v Greater N.Y. Mut. Ins. Co.*, 250 AD2d 109 [1998]). The provisions in the Fidelity Policy at issue are clear. The Policy insured the Aharons "against loss or damage" incurred under either of the following scenarios: "(1) Title to the estate or interest described in Schedule A being vested other than as stated therein; (2) Any defect in or lien or encumbrance on the title; (3) Unmarketability of title; (4) Lack of right of access to and from the land." No other matters are insured by the Policy.

A policy of title insurance is a contract by which the title insurer agrees to indemnify its insured for loss occasioned by a defect in title (*see L. Smirlock Realty Corp. v Title Guarantee Company*, 52 NY2d 179 [1981]; 9 Appleman, *Insurance Law and Practice*, § 5201; 13 Couch, *Insurance* [2d ed], § 48:108). Thus, when an underlying policy does not challenge title, the title insurance company is not obligated to defend or indemnify the insured (*id.*). The liability of the title insurer to its insured is governed and limited by the terms and conditions contained in the policy (*Citibank, N.A. v Commonwealth Land Title Insurance Company*, 228 AD2d 635 [1996]). "[T]he title insurer will be liable for hidden defects and all matters affecting title within the policy coverage and not excluded or specifically excepted from coverage" (*id.*, quoting 5A Warren's *Weed, New York Real Property, Title Insurance* § 1.03[6] [4th ed], at 15). Here, there is no claim of any defect in the title to the property. Rather, the claim is that the Aharons are liable in trespass due to an encroaching fence located 7.8 feet into the Ramanathans' property. The Aharons deny the allegations on the basis that the fence is located on their own property line or, alternatively,

if the fence is located within the Ramanathans' property, the Aharons own the land up to that point due to their adverse possession which commenced in October 1999. Significantly, the Ramanathans do not allege that the boundary lines of each of the parties' respective property were in any way incorrectly recorded nor that the lands have been inappropriately deeded. The underlying dispute between the parties is merely a disagreement as to whether the alleged encroaching fence is located on the Aharons' property or on the Ramanathans' property, and does not implicate title.

Notably, the Aharons concede that the property to which they hold title is not based on the fence location because their answer did not deny the pertinent allegations in the complaint on this point. Paragraph 5 of the complaint provides a full metes-and-bounds legal description of the Ramanathans' land, while paragraph 6 provides a full metes-and-bounds legal description of the Aharons' land. Both descriptions correspond to the deeds of record. Paragraph 4 of the original complaint asserts that the Aharons acquired title to this property by deed and includes a copy of the deed as an exhibit. The legal description in paragraph 6 of the complaint matches exactly with the legal description in the Aharons' policy. Importantly, neither description includes any mention of the fence as a marker, and the location of the fence is irrelevant to these descriptions. In their answer to the complaint, the Aharons do not deny these statements. Therefore, these allegations are deemed admitted as accurate descriptions of the land owned by the Aharons and which is insured by the Fidelity policy (*see* NY CPLR § 3018[a] [statements pled and not denied are "deemed admitted"]; *Forteau v Westchester County*, 196 AD2d 440 [1993]). Thus, while a fence might serve as a property line marker in some instances, such circumstances are not presented here. Whether or not the fence is located on the Ramanathans' property or on the Aharons' property is a matter of dispute solely between those parties entirely unrelated to the Aharons' title or the Aharons' policy with Fidelity (*see Borg-Warner Corp. v Ins. Co. of North America*, 174 AD2d 24 [1992]; *see also County of Broome v Aetna Cas. & Surety Co.*, 146 AD2d 337 [1989]).

As part of their defense to the complaint, the Aharons argue that a survey performed by William R. Simmons, dated December 20, 1994 (Simmons Survey), indicates that the fence is located within the Aharons' parcel of land and, thus, does not encroach on the Ramanathans' land. The Aharons presented this argument to Fidelity, while pointing out that the Ramanathans presented a survey, dated June 2, 2009, which shows the fence encroaching 7.8 feet into the Ramanathan lot. According to the Aharons' claim letter to Fidelity, this variance between the surveys should be covered under their policy. The Aharons' claim, however, directly contradicts Schedule B of the Policy which clearly and unambiguously excludes such matters from coverage. Schedule B of the Policy specifically excepts from coverage the "Variation between location of fences, hedges, retaining wall and line of record title" as shown on the Simmons Survey. Thus, any variance in fence location indicated on the survey at issue was excepted within the Policy. Where, as here, the Policy excludes such

items from coverage, a third-party action against the insurer for the same may be dismissed (see *Frydman v Fidelity Natl. Title Ins. Co.*, 68 AD3d 622 [2009]).

It bears emphasis here that the documentary proof in the form of the two surveys before the court both show that a concrete retaining wall lies on the line of record title. The 2009 survey prepared for the Aharons clearly shows that the disputed fence lies on the Ramanathans' side of the concrete retaining wall. The Aharons have presented no evidence, just mere assertion, that the fence is within the boundaries that Fidelity insured. All the evidence shows that the fence is beyond their lines of record title past the retaining wall which lies directly on the line of record title.

The Aharons' adverse possession counterclaim of ownership in the land up to the fence is also expressly excluded from the Policy. The Aharons have interposed a counterclaim asserting that if the fence is located on the Ramanathans' lot, then the Aharons have acquired ownership of the strip of land up to the point of the fence, through adverse possession. According to the counterclaim, the Aharons' ownership interest vested in October 2009 — 10 years after they took possession of the land in 1999 and 10 years after the effective date of their Policy, October 14, 1999. To the extent, however, that the Aharons seek a defense or indemnity from Fidelity on this basis, their claim fails because the Policy does not insure property acquired after the date of the Policy. Under the heading "Exclusions From Coverage," the Policy states, "The following matters are expressly excluded from the coverage of this policy and the Company will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of: . . . 3. Defects, liens, encumbrances, adverse claims or other matters: . . . (b) attaching or created subsequent to Date of Policy . . ." The Aharons' counterclaim for ownership is an "adverse claim" or "other matter" which was "created subsequent" to the date of the Policy and is not covered thereby.

When, as here, an insured claimant fails to assert any facts which would raise an issue "as between" itself and its insurer, the claim for coverage should be dismissed for failure to state a cause of action pursuant to CPLR 3211(a)(7) (see *Seaport Park Condominium v Greater New York Mutual Ins. Co.*, 39 AD3d 51 [2007]). Further, the insurance policy at issue may serve as sufficient documentary evidence for the court to find the claim of coverage to be without merit (*id.*).

Accordingly, the motion to dismiss is granted.

Dated: September 9, 2010

J.S.C.